No. 82-1888

In the Supreme Court of the United States

OCTOBER TERM, 1983

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
APPELLANT

v.

JOSEPH FALZON, ET AL.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether orders of a Michigan trial court directing that depositions be taken of German nationals in the Federal Republic of Germany are contrary to bilateral and multilateral agreements between the United States and the Federal Republic of Germany.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Miscellaneous—Continued Page

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

In this products liability suit, a Michigan trial court has entered two orders directing that depositions be taken of German nationals in the Federal Republic of Germany (hereinafter FRG). The question on this appeal is whether such orders are valid under a bilateral exchange of notes between the United States and the FRG, T.I.A.S. No. 9938 (February 11, 1955; January 13, 1956; October 8, 1956; October 17, 1979; February 1, 1980) (hereinafter Exchange of Notes), set forth at J.S. App. 61a-71a, or

under the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555, T.I.A.S. No. 7444, opened for signature March 18, 1970, entered into force between the United States and the FRG on June 26, 1979 (hereinafter Evidence Convention), set forth at J.S. App. 34a-52a.

On June 3, 1977, appellees filed an action for damages in Michigan Circuit Court against appellant and others for personal injuries sustained in an accident on October 27, 1974, while appellees were riding in a microbus designed and manufactured by appellant (J.S. App. 8a-9a). In June 1980, appellees noticed the depositions in Germany of a number of appellant's employees pursuant to Rule 306 of the Michigan General Court Rules (GCR) (J.S. App. 9a, 12a). Appellant moved to quash the depositions on the grounds, inter alia, that the procedure proposed by appellees was contrary to the Evidence Convention, to United States constitutional and statutory provisions, to German law and to the GCR (*id.* at 10a, 13a-14a).

In an order entered October 7, 1980, the trial court directed that the depositions be scheduled but that the Exchange of Notes "will control the course of the taking of these depositions" (J.S. App. 24a). (The Exchange of Notes provides for the taking of testimony only by United States consular officers (*id.* at 61a-66a).) The trial court's order required that the "deponents shall answer all questions promulgated," that counsel could raise objections to questions, and that the transcript would be placed under seal so that objections could subsequently be resolved by the court (*id.* at 24a). The order also provided that appellees would pay their own costs "should [appellees] be unable to take said depositions because of the operation

of German law or because of the opposition of the Federal Republic of Germany" (*id.* at 25a). The trial court certified its order for interlocutory appeal, but, on May 27, 1982, the Michigan Court of Appeals denied appellant's applications for leave to appeal "for failure to persuade the Court of the need for immediate appellate review" (*id.* at 3a).

Subsequently, on August 17, 1982, the trial court ordered appellant to "produce for depositions in Wolfsburg, Germany, all employees" named in the earlier order for deposition (J.S. App. 7a). This second order provided that failure by appellant to produce the employees "shall subject [appellant] to appropriate sanctions as will be determined by this Court") (*ibid.*). On February 22, 1983, the Michigan Supreme Court denied appellant's application for leave to appeal "because the Court is not persuaded that the questions presented should be reviewed by this Court" (*id.* at 2a).

DISCUSSION

The orders of the Michigan trial court conflict with the obligations of the United States under the Evidence Convention, are not authorized by the Exchange of Notes, and therefore are invalid under the Supremacy Clause (U.S. Const. Art. VI, Cl. 2). See *United States* v. *Pink*, 315 U.S. 203, 230-231 (1942). Because the State Department will instruct United States consular officers in the FRG not to conduct the ordered depositions, however, no international law violation will result at this stage of the litigation. Accordingly, review by this Court is not warranted at the present time.[1]

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[1] We note that this Court appears to lack jurisdiction over this case except by way of certiorari under 28 U.S.C. 1257(3),

1. The Evidence Convention was fashioned after the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, November 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, entered into force for the United States, February 10, 1969 (hereinafter Service Convention), which comprehensively regulates the procedures for effective transnational service among member states. The United States played a dominant role in the negotiation of both the Service and Evidence Conventions, and encouraged foreign states to join both, largely on the strength of representations concerning substantial reforms in United States law and procedures that came about as a result of changes in 1963 to the Federal Rules of Civil Procedure (Fed.

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as requested in the alternative by appellant pursuant to 28 U.S.C. 2103 (see J.S. 18). Appellate jurisdiction under 28 U.S.C. 1257(1) clearly is not appropriate here, because the state courts have issued no decision in this case against the validity of a treaty. Similarly, jurisdiction by way of appeal under 28 U.S.C. 1257(2) also is unavailable. The record, as reflected in the papers filed in this Court, does not reveal that appellant explicitly challenged the validity of the Michigan Court Rules as applied, but rather shows that appellant attacked the particular actions of the trial court as invalid on federal grounds. There is therefore no jurisdiction under 28 U.S.C. 1257(2). See *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 562-563 n.4 (1980) (plurality opinion); *Hanson* v. *Denckla*, 357 U.S. 235, 244 & n.4 (1958); *Charleston Federal Savings & Loan Ass'n* v. *Alderson*, 324 U.S. 182, 185-187 (1945). This case, like virtually every case, involves court actions taken pursuant to court rules. No distinctions in the court rules themselves are challenged, as in *Mayer* v. *City of Chicago*, 404 U.S. 189 (1971), and *In re Griffiths*, 413 U.S. 717, 718 (1973), and no assertedly unconstitutional application of a substantive state statute is involved, as in *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 440-441 (1979), and *Cohen* v. *California*, 403 U.S. 15, 17-18 (1971).

R. Civ. P. 4(i) and 28(b)) and amendments in 1964 to the Judicial Code (28 U.S.C. 1696, 1781 and 1782). United States courts have consistently and properly held that litigants wishing to serve process in countries that are parties to the Service Convention must follow the procedures provided by that Convention unless the nation involved permits more liberal procedures. See *DeJames* v. *Magnificence Carriers, Inc.*, 654 F.2d 280, 287-289 (3d Cir. 1981); *Richardson* v. *Volkswagenwerk, A.G.*, 552 F.Supp. 73, 78-79 (W.D. Mo. 1982); *Porsche, A.G.* v. *Superior Court*, 123 Cal. App. 3d 755, 760-762, 177 Cal. Rptr. 155, 157-159 (1981); *Low* v. *Bayerische Motoren Werke*, 88 A.D.2d 504, 505, 449 N.Y.S.2d 733, 735 (1982); *Kadota* v. *Hosogai*, 125 Ariz. 131, 134-138, 608 P.2d 68, 71-75 (Ct. App. 1980); *Cintron* v. *W & D Machinery Co.*, 182 N.J. Super. 126, 135, 440 A.2d 76, 81-82 (1981).

Similarly, the Evidence Convention deals comprehensively with the methods available to United States courts and litigants to obtain proceedings abroad for taking evidence. Most civil law countries provide much less freedom in the collection of evidence for use in foreign proceedings than do the United States and other common law countries. See Edwards, *Taking of Evidence Abroad in Civil or Commercial Matters*, 18 Int'l & Comp. L. Q. 646, 647 (1969). This is because civil law countries regard the taking of evidence as a judicial function rather than as an act of the parties; when evidence is taken without the participation or consent of officials of the host country, the "judicial sovereignty" of the host country is considered to have been violated. See *ibid.*; *Report of United States Delegation to Eleventh Session of the Hague Conference on Private International Law*, 8

Int'l Legal Materials 785, 804, 806 (1969). Efforts to accommodate these differences resulted in the Evidence Convention, which provides substantial benefits to United States litigants. For instance, unlike the situation prior to the Convention, United States litigants can now be assured of compulsory attendance of witnesses abroad (Art. 10), and testimony under oath and verbatim recording are now available (Art. 9). See Shemanski, *Obtaining Evidence in the Federal Republic of Germany: The Impact of the Hague Evidence Convention on German-American Judicial Cooperation*, 17 Int'l Law. 465, 473-474 (1983). The parties to the Convention contemplated that proceedings not authorized by the Convention would not be permitted. The Convention accordingly must be interpreted to preclude an evidence taking proceeding in the territory of a foreign state party if the Convention does not authorize it and the host country does not otherwise permit it. Appellees do not appear to argue to the contrary.

The Evidence Convention provides for three alternative methods of conducting evidence taking proceedings abroad in connection with civil or commercial litigation in United States courts: (1) a letter rogatory (called in the English text of the Convention a "letter of request") transmitted through a foreign "Central Authority" to a foreign court, which conducts the proceeding (Arts. 1-14); (2) notice to appear before an American diplomat or consular officer (Arts. 15-16); and (3) designation of a private commissioner to take evidence (Art. 17). The three methods correspond to those provided for by Fed. R. Civ. P. 28(b). See generally Note, *Taking Evidence Outside of the United States*, 55 B. U. L. Rev. 368 (1975). The second and third methods, which do not

involve proceedings before a judicial authority of the host country, are subject to strict limitations in the Evidence Convention. In particular, a party to the Convention is expressly permitted to reserve the right not to allow the taking of evidence before a consular officer or diplomat, or before a private commissioner (Art. 33, 35). The FRG made such a reservation, stating "that the taking of evidence by diplomatic officers or consular agents is not permissible in its territory if German nationals are involved" (J.S. App. 50a). Thus, in the absence of an additional international agreement (see Art. 28(g), Art. 32), the Evidence Convention precludes proceedings to take evidence from German nationals in the FRG in aid of United States litigation, with the exception of the letter of request procedure.[2] The instant orders requiring depositions before a United States consular officer are therefore barred by the Evidence Convention unless authorized by the Exchange of Notes.[3]

2. a. The Exchange of Notes occurred in 1955 and 1956. Following World War II, the United States and other occupying powers took evidence in occupied

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[2] Evidence may also be taken from German nationals by private commissioners, but only on express prior approval of the relevant FRG Central Authority (Art. 17; FRG Instrument of Ratification, ¶ B(4), set forth at J.S. App. 52a). See Shemanski, *supra*, 17 Int'l Law. at 479.

[3] The fact that a state court has personal jurisdiction over a private party (see Motion to Dismiss or Affirm 23) does not mean that treaty limits on proceedings for the taking of evidence abroad somehow do not apply to discovery orders addressed to such parties. The Evidence Convention protects the judicial sovereignty of the country in which evidence is taken, not the interests of the parties to the suit. Accordingly, its strictures apply regardless of the existence of personal jurisdiction.

Germany on their own terms.[4] With the termination of the Occupation Regime in the FRG in 1955, however, control over foreign evidence gathering on German territory became a matter within the exclusive control of German authorities and German law. Because the United States desired to retain the exceptional privilege of taking evidence from German and third-country nationals on German soil, the Office of the United States High Commissioner for Germany initiated an exchange of notes with the German Federal Ministry of Foreign Affairs on February 11, 1955 (J.S. App. 61a-66a). See generally Shemanski, *supra*, 17 Int'l Law. at 477-478; *Volkswagenwerk, A.G.* v. *Superior Court*, 123 Cal. App. 3d 840, 854-855, 176 Cal. Rptr. 874, 882-883 (1981). The initial note stated, inter alia, that, "[i]n the absence of a current German law prohibiting it or a specific request from the German authorities that such testimony not be taken, American consular officers in Germany will continue as they have since the war to take the voluntary depositions of all nationalities" (J.S. App. 61a).

In its reply note of January 13, 1956 (J.S. App. 62a-63a, 64a-65a), the German Ministry of Foreign Affairs accepted the High Commissioner's proposal and agreed that no objection would be raised to the questioning of German or other non-American nationals by United States consular officers in the Federal Republic, on the following conditions (*id.* at 64a):

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[4] The occupying powers gathered evidence freely from German and third-country nationals in connection with such matters as war crimes investigations, restitution cases, the location of missing persons, and other similar endeavors related to the war.

1) No compulsion of any kind will be used to force the person to be questioned either to appear or to make statements; specifically,

(a) the request to give information will not be called a "summons," and the questioning will not be called an "interrogation";

(b) there will be no threat of compulsory measures in the event of non-appearance or refusal to give information;

(c) a person willing to give information will in no way be compelled to sign records or other written statements of information given orally;

2) The questioning will take place on the premises of an American consulate;

3) The person to be questioned will be afforded the opportunity to be accompanied by counsel.

Subsequently, in a further note of October 8, 1956 (J.S. App. 63a, 65a-66a), the FRG agreed, "on the condition of reciprocity, to visits by American investigating officers to non-Americans for the purpose of questioning within the meaning of the note verbale of January 13, 1956 * * * at the latter's homes and places of business, provided the persons to be questioned expressly request questioning to be conducted at their homes or places of business, or expressly consent to this form of questioning" (*id.* at 65a). The United States and the FRG agreed in 1980 that the original 1955-1956 exchange would continue to be regarded as valid notwithstanding the entry into force for the FRG of the Evidence Convention in June 1979 (J.S. App. 67a-71a).

b. The depositions ordered by the Michigan trial court are not authorized by the Exchange of Notes. The Exchange repeatedly and emphatically makes

clear that testimony will be voluntary and not compelled (see J.S. App. 64a, 70a). In contrast, the depositions ordered by the trial court are clearly compulsory. Although the order of October 7, 1980, provides that the Exchange of Notes "will control the course of the taking of these depositions" (*id.* at 24a), the order also provides "that deponents *shall* answer all questions promulgated (*ibid.*) (emphasis added). The August 17, 1982 order similarly requires appellant to produce the deponents in Germany on pain of "appropriate sanctions as will be determined by this Court" (*id.* at 7a).

Moreover, the Exchange of Notes applies only in the absence of a "specific request from the German authorities that such testimony not be taken" (J.S. App. 61a). In a letter dated June 25, 1982, from the German Ambassador to the United States to then Chief Judge Coleman of the Michigan Supreme Court (J.S. App. 72a-74a), and in more recent diplomatic notes from the German Embassy to the Department of State (App., *infra*, 1a-10a),[5] the FRG has made such a specific request.[6]

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[5] The orders in the instant case and in other cases (*e.g.*, *Volkswagenwerk, A.G.* v. *Superior Court, supra*) have resulted in strong written and oral diplomatic protests from the FRG. In May 1983, representatives of the FRG and the United States Department of State informally agreed that the FRG would continue to permit United States consular officers to take voluntary testimony from non-United States nationals in Germany for a limited time, pending further formal clarification of the Exchange of Notes. It was also agreed that the United States would notify the German Federal Ministry of Justice in advance of all intended evidence taking, so that the FRG would have the opportunity to exercise its right of veto in a given case.

[6] Since the FRG's protests are specifically directed at the Michigan trial court's orders, which the FRG considers in-

Because of the compulsory nature of the depositions ordered, and because of the specific objection of the FRG, the depositions are clearly unauthorized under the Exchange of Notes, and therefore are barred under the Evidence Convention. The Department of State accordingly intends to instruct United States consular officials in the FRG not to conduct the depositions as ordered by the trial court.

3. Because these instructions from the Department of State will preclude the taking of the depositions, review by this Court is not warranted at this time.[7] The October 7, 1980 order provides that the Exchange of Notes will "control the course of the taking of these depositions" (J.S. App. 24a), and appellees defend the trial court orders on the basis of the Exchange of Notes (Motion to Dismiss or Affirm 13-18). The Exchange of Notes deals only with the taking of evidence by consular officers (J.S. App. 61a, 64a). Thus, the refusal of the United States consul to participate will prevent the ordered depositions from taking place. The October 7, 1980 order in fact contemplates that appellees may "be unable to take said depositions because of the operation of German law or because of the opposition of the Federal Republic of Germany" (*id.* at 24a-25a). Because the depositions will not take place, no violation of German ju-

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herently compulsory, we cannot predict whether the FRG would object to the voluntary testimony of appellant's employees in the FRG in the absence of such orders. Furthermore, of course, the Evidence Convention machinery remains available to appellees.

[7] If the appeal is not otherwise dismissed for lack of jurisdiction (see note 1, *supra*), it should be dismissed on the ground that it does not present a substantial federal question at this stage of the litigation. For the same reason, the alternative petition for a writ of certiorari should be denied.

dicial sovereignty will result from the trial court orders at issue in this case.

It may be, of course, that the trial court will order sanctions against appellant on account of the failure of the depositions to take place. The August 17, 1982 order appears to contemplate such sanctions. The imposition of such sanctions on a private litigant on the ground that government officials refuse to preside over the taking of depositions may itself result in a violation of the Evidence Convention, but whether it does so is an issue that has not been addressed by the Michigan courts in this case. Because no sanctions have yet been imposed, review of the issue at this stage would be premature. See *NAACP* v. *Williams*, 359 U.S. 550 (1959); *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62 (1948).

CONCLUSION

The appeal should be dismissed, and the alternative petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1983

APPENDIX

P83 0140-1185

EMBASSY OF THE
FEDERAL REPUBLIC OF GERMANY
Washington, D.C.

The Embassy of the Federal Republic of Germany presents its compliments to the Department of State and, referring to its previous discussions with the Department concerning the Falzon vs. Volkswagen case, has the honor to request once again the Department's assistance in the same matter.

It has been brought to the Embassy's attention that the Falzon vs. Volkswagen case is pending on appeal before the United States Supreme Court.

The Embassy transmits herewith copies of

—a letter of the Ambassador of the Federal Republic of Germany of June 25, 1982, addressed to Judge Mary S. Coleman, Supreme Court of the State of Michigan,[*]

—the Embassy's note verbale of August 20, 1982,

—a note verbale dated April 28, 1983, addressed by the German Federal Foreign Office to the United States Embassy in Bonn.

The Embassy wishes to confirm that these documents state the position of the Government of the Federal Republic of Germany and would be very grateful to the Department for bringing them to the attention of the United States Supreme Court.

At the same time, the Embassy refers to the discussions held in Washington on May 31, 1983, be-

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* This letter is reproduced at J.S. App. 72a-74a.

tween officers of the German Federal Foreign Office and the Federal Ministry of Justice and officers of the US Department of State and the US Department of Justice, in which an understanding was reached on further measures to be taken with a view to facilitating the taking of evidence on a voluntary basis and to improving mutual assistance under the Hague Convention of March 18, 1970, on the Taking of Evidence Abroad in Civil and Commercial matters.

In this context, the Embassy wishes to reiterate that it remains the formal position of the government of the Federal Republic of Germany that evidence for use in civil matters pending in the United States which is not given by German citizens on a strictly voluntary basis, may only be obtained in the Federal Republic of Germany through the channels authorized by and in accordance with the provisions of the Hague Evidence Convention.

Washington, D.C., November 7, 1983

Department of State
Washington, D.C.

[SEAL]

EMBASSY OF THE
FEDERAL REPUBLIC OF GERMANY
Washington, D.C.

The Embassy of the Federal Republic of Germany presents its compliments to the Department of State and has the honor to request assistance of the Department in the following international legal matter:

In the cases of Falzon vs. Home Insurance Co., Civ. Action No. 77, 722, 371 NP and Falzon vs. Volkswagen of America, Inc., Civil Action No. 78, 803, 043 NP an order has been issued from the Circuit Court, Wayne County, State of Michigan, on Tuesday, August 17, 1982 that depositions of twelve German citizens proceed in Wolfsburg, Federal Republic of Germany.

Plaintiff's attorney intends to travel to Germany this weekend to proceed with the depositions on August 24. A similar order previously issued in this case is presently on appeal at the Michigan Supreme Court and an application for stay of the latest order was made yesterday at the Michigan Supreme Court.

The order impinges upon the territorial sovereignty of the Federal Republic of Germany. The position of the Federal Republic of Germany has been communicated to the Michigan Supreme Court by letter attached hereto.

It is particularly distressing that such attempt to take depositions in the Federal Republic of Germany is not been made in accordance with procedures of the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters to which both the United States and the Federal Republic of Germany are parties.

The Embassy of the Federal Republic of Germany would appreciate if the United States Government could intervene with the Michigan Supreme Court supporting the granting of stay permitting for argument to be presented in this matter to avoid acts inconsistent with the Hague Convention and the position of the German Government.

Washington, D.C., August 20, 1982

Department of State
Washington, D.C.

DOPPEL

AUSWÄRTIGES AMT
512-521.60 USA

Verbalnote

Das Auswärtige Amt beehrt sich, der Botschaft der Vereinigten Staaten von Amerika folgendes mitzuteilen:

In dem bei dem Supreme Court of the State of Michigan anhängigen Verfahren Falzon et al. vs. Volkswagen of America Inc. et al., Docket No. 69595 & 69596, hat die Volkswagenwerk Aktiengesellschaft (VW AG) in Wolfsburg das Auswärtige Amt und das Bundesministerium der Justiz davon unterrichtet, daß auf Grund einer Notice of Deposition beabsichtigt sei, im Generalkonsulat der Vereinigten Staaten von Amerika in Hamburg oder Frankfurt/Main am 02. Mai 1983 zehn Mitarbeiter der VW AG durch einen Anwalt der Kläger unter Eid vernehmen zu lassen.

Das Auswärtige Amt beehrt sich, die diesbezügliche Rechtslage wie folgt darzulegen:

Zwischen der Bundesrepublik Deutschland und den Vereinigten Staaten von Amerika ist das Haager Übereinkommen vom 18. März 1970 in Kraft getreten (BGBl. 1977 II S. 1452, Bkm. vom 21. Juni 1979, BGBl. II S. 780 und vom 05. September 1980, BGBl. II S. 1290). Nach Artikel 17 des Übereinkommens darf von dem Beauftragten des Gerichts eines Vertragsstaates in einem anderen Vertragsstaat

....

An die
Botschaft der
Vereinigten Staaten von Amerika

eine Beweisaufnahme, insbesondere also auch eine eidliche oder uneidliche Vernehmung von Zeugen, nur vorgenommen werden, wenn dieser andere Vertragsstaat zuvor die Genehmigung dazu erteilt. In Abschnitt B Nr. 4 der Erklärung, welche die Bundesrepublik Deutschland bei der Hinterlegung der Ratifikationsurkunde abgegeben hat, ist diese Rechtslage nochmals ausdrücklich bekräftigt worden (s. Bkm. vom 21. Juni 1979); ebenso in § 12 Abs. 1 des Ausführungsgesetzes vom 22. Dezember 1977 (BGBl. I S. 3105).

Die Zentralen Behörden der deutschen Bundesländer, die nach den innerdeutschen Ausführungsvorschriften für die Genehmigung von Beweisaufnahmen zuständig sind, erteilen derartige Genehmigungen jedoch nicht, wenn deutsche Staatsangehörige (Angehörige deutscher Firmen) als Zeugen, sei es eidlich oder uneidlich, vernommen werden sollen, da ihnen die Schutzgarantien des deutschen Verfahrensrechts erhalten bleiben müssen. Dementsprechend heißt es auch in § 11 des Ausführungsgesetzes: "Eine Beweisaufnahme durch diplomatische oder konsularische Vertreter ist unzulässig, wenn sie deutsche Staatsangeörige betrifft." Hierin spiegelt sich der erwähnte Schutzgedanke wider, der uneingeschränkt auch bei Beweisaufnahmen, die durch den Beauftragten des Gerichts eines anderen Vertragsstaates vorgenommen werden sollen, von den Zentralen Behörden der Bundesländer praktiziert wird.

Die von dem US-Gericht angeordnete Zeugenvernehmung kann deshalb nur im Wege der Rechtshilfe durch ein deutsches Gericht vorgenommen werden. Die Anwälte der Parteien können bei der Vernehmung anwesend sein und Fragen stellen, soweit sie nach deutschem Verfahrensrecht zulässig sind;

hierüber entscheidet der vernehmende Richter. Die Vernehmung kann mit einem Tonbandgerät aufgenommen werden; das Tonband kann dem ersuchenden Gericht zur Verfügung gestellt werden. Mitglieder des ersuchenden ausländischen Gerichts können bei der Vernehmung durch das zuständige deutsche Amtsgericht zugegen sein, wenn die Zentrale Behörde dies genehmigt hat. Mit diesen Regelungen ist hinreichend sichergestellt, daß sich die Zeugen zu dem Beweisthema umfassend äußern. Auf Wunsch des ersuchenden Gerichts erfolgt die Vernehmung unter Eid (Art. 3 Abs. 2 Buchst. h des Übereinkommens.)

Das Auswärtige Amt geht daher davon aus, daß die vorgesehene Vernehmung in der beabsichtigten Form nicht stattfinden wird und stellt dem Supreme Court of the State of Michigan anheim, eine etwa noch beabsichtigte Vernemung nach dem Haager Übereinkommen über die zuständige deutsche Zentrale Behörde, nämlich den Niedersächsischen Minister der Justiz, D-3000 Hannover, beim Amtsgericht in Wolfsburg zu beantragen.

Das Auswärtige Amt benutzt diesen Anlaß, die Botschaft der Vereinigten Staaten von Amerika erneut seiner ausgezeichneten Hochachtung zu versichern.

Bonn, den 28. April 1983

L.S.

INFORMAL TRANSLATION OF GERMAN FEDERAL FOREIGN OFFICE NOTE VERBALE OF APRIL 28, 1983 TO THE AMERICAN EMBASSY, BONN

The foreign office has the honor to inform the Embassy of the United States of America of the following:

In the proceeding entitled Falzon et al. vs. Volkswagen of America Inc. et al., Docket No. 69595 and 69596, which is pending before the Supreme Court of the State of Michigan, Volkswagenwerk AG in Wolfsburg has informed the Foreign Office and the Federal Ministry of Justice that it is intended, on the basis of a notice of deposition, that a lawyer of the plaintiffs should depose 10 employees of VWAG under oath in the Consulate General of the United States of America in Hamburg or Frankfurt/Main on May 2, 1983.

The Foreign Office has the honor to set forth the legal situation in regard to this matter:

The Hague convention of March 18, 1970, has entered into force between the Federal Republic of Germany and the United States of America. Under Article 17 of the Convention Evidence may be taken (Beweisaufnahme) by a Commissioner of a Court of One State Party in another State Party, including in particular a deposition of witnesses (Vernehmung) under oath or not under oath, only if the other State Party has previously given its consent. In paragraph B(4) of the declaration which the Federal Republic of Germany made upon deposit of the instrument of

ratification, this legal situation was again expressly confirmed.

The Central Authorities of the German Federal states, which under domestic implementing regulations are responsible for granting permission for the taking of evidence, do not grant such permission where German Nationals (members of German firms) are to be deposed as witnesses, whether under oath or not, since the protection of German procedural law must be guaranteed to them. Accordingly, section 11 of the implementation law reads: "The taking of evidence by diplomatic or consular representatives is not permissible where German Nationals are concerned." This provision reflects the aforementioned concept of protection, which is practiced by the Central Authorities of the Federal states without reservation, even with respect to the taking of evidence by a Commissioner of a Court of Another State Party.

The deposition of witnesses which has been ordered by the U.S. Court can, therefore, be undertaken only by a German Court through the judicial assistance channel. The lawyers of the parties can be present at the deposition and ask questions, insofar as they are permissible under German procedural law; the deposing judge decides such matters. The deposition can be tape-recorded and the tape made available to the requesting court. Members of the requesting foreign court can be present at the deposition by the Competent German District Court, if the central authority so permits. These regulations sufficiently ensure that the witnesses address the subject matter of the proceeding comprehensively. If the requesting court so desires, the deposition can take place under oath (Art. 3, Para. 2(H) of the Convention).

The Foreign Office thus proceeds on the basis that the planned deposition will not take place in the manner intended, and it leaves it to the Supreme Court of the State of Michigan to make application for any future deposition with the District Court in Wolfsburg through the Competent German Central Authority, namely the Ministry of Justice of Lower Saxony, D-3000 Hannover, in accordance with the Hague Convention.

(Complimentary closing).

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